counterclaim. Accordingly this appeal is dismissed with costs here and in the court below.

*Appeal dismissed.*

Solicitors: *Jagjit Singh & Co.; Sri Ram, Zulkifly & Kumar.*

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## YAP LAI YOKE v. CHIN FOOK WAH & CONNECTED CASE

**[F.C (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) March 21 & June 11, 1984]**

**[Kuala Lumpur – Federal Court Civil Appeals Nos. 223 & 228 of 1983]**

*Land Law – Encroachment on land of registered proprietor – Trespass – Qualified title – Survey – Boundaries conclusive – National Land Code, ss. 176 & 396.*

In this case the respondent, the registered proprietor of land under qualified title, claimed that the owners of adjoining lots had unlawfully built extensions to their buildings thereby encroaching on the respondent's land. He brought an action for trespass and judgment was given in his favour in the High Court. The appellants appealed.

**Held,** dismissing the appeal: the respondent had established on the balance of probabilities that the lands upon which the appellants had trepassed was his. The wrong siting of the road which caused certain lots to have more land and others to have less was a matter between the authorities and the respective landowners.

*Case referred to:*

(1) *Ocean Estates Ltd.* v. *Norman Pinder* [1969] 2 A.C. 19.

FEDERAL COURT.

*Ronald Khoo* (*Miss Y.N. Foo* with him) for the appellant in Civil Appeal No. 223 of 1983.

*S.Y. Chow* for the appellant in Civil Appeal No. 228 of 1983.

*V.P. Pradhan* for the respondent.

*Cur. Adv. Vult.*

**Lee Hun Hoe C.J. (Borneo)** (delivering the Judgment of the Court): The plaintiff Chin Fook Wah is the administrator of the estate of Chin Lan (deceased) the owner of Lot 1735 in the Mukim of Ulu Kelang in the State of Selangor. He is now the registered proprietor of the land under qualified title under H.S.(M) 343. The two defendants are owners of adjoining lots. Yap Lai Yoke is the owner of Lot 1738 and Yong Ah Noi @ Yong Sau Fong the owner of Lot 1739. In the course of their occupation both unlawfully built extensions to their buildings thereby encroaching on the plaintiff's land. In the case of Yap Lai Yoke the encroachment is 550 square feet and Yong Ah Noi 590 square feet. Both denied trespass and put the plaintiff to strict proof.

There is a temporary house on Lot 1735. The plaintiff's father moved into the house in 1955 and lived there until he died in 1978. Some lots were originally used for fire rehabilitation scheme. Fire victims originally moved into this area under such scheme. The plaintiff has never stayed on Lot 1735 but used to visit it every month. Hence he knew of the extensions. There was a zinc fencing separating the lots. The zinc fencing is still standing there. Since his father's death he has rented out the house. He wanted to build a concrete house on the land but was prevented from doing so because of the encroachments.

In 1979 plaintiff instructed a licensed surveyor Cheong Fook Hoe (P.W.2) to carry out a survey. As a result of the survey he learned of the extent of the encroachments. On November 30, 1979 he wrote to the Majlis Daerah Gombak asking whether any approval was given for the building of the extensions to both houses on Lots 1738 and 1739. The reply was in the negative. So, on December 30, 1979 he wrote to both defendants in similar terms notifying them of the encroachments and asking them to remove the encroachments.

The area of encroachment calculated by P.W.2 was accepted by the defendants in documents marked "D" and "E". At page 75 of the Appeal Record in Federal Court Civil Appeal No. 223 of 1983 shows the extent of encroachments in these words:–

"1. The concrete house on Lot 1739 has encroached about 6 to 6½ feet into Lot 1735. The area of the building encroaching is about 200 sq. ft.

The fencing has encroached about 11 feet and the area taken out of Lot 1735 is about 555 sq. ft.

2. The concrete building on Lot 1738 has encroached about 8½ to 9½ feet into Lot 1735. The area of the building encroaching is about 223 sq. ft. The toilet and bathroom which is about 55 sq. ft. has entirely encroached onto Lot 1735.

The fencing has encroached about 11 feet at the southern end and 14 feet at the northern end, and the area taken out of Lot 1735 is about 596 sq. ft.

As a result of this encroachment, the width of Lot 1735 is now about 48 feet at the road frontage and about 38.5 feet at the back end."

After receiving letters from the plaintiff the defendants engaged Chong Toong Choong (D.W.2), a surveyor on March 1981 to carry out a survey. It turned out that prior to setting up his own practice he was the Chief Surveyor who was responsible for the plan C-1. He checked the boundaries. He found the houses in Lots 1735, 1738 and 1736 were off centre of the road reserve by about 24 feet and not following the boundaries as given in C-1. The common boundaries were not in compliance with boundaries laid out in C-1, and their back boundaries also did not follow the plan and the depth of their lots were also short of the dimensions given in C-1. He said these were due to wrong siting of the road.

When the defendants questioned the surveyor as to what ought to be done, Mr. Pradhan objected to the question as the defence was a denial of trespass. The defendants said the purpose of the question was to enable the defendants to invite the court to invoke certain powers under the provisions of section 417 of the National Land Code. Mr. Pradhan pointed out that the section did not empower the court to make an order for resiting of the road as envisaged by the defendants. What the defendants wanted was for the court to order a resurvey.

The learned Judge allowed the question. The surveyor explained that all the lands in the area in C-1 are held by qualified titles. A survey has been done and marks put in for the issuance of final titles. He found Lots 1736 to 1739 and Lots 1740 to 1742 to be displaced. Since these lots have been displaced and the road wrongly sited he recommended a resurvey for the purpose of making a more correct plan to issue final titles. As plan C-1 has not been used for issue of final title the survey department can be asked to re-survey by following the occupancy lines. In answer to cross-examination D.W.2 conceded that C-1 is the final survey.

From the evidence of the Assistant Collector of Land Revenue, Encik Ali Badaruddin bin Abdul Kadir (D.W.3) there would seem to be lack of co-ordination between his department and the survey department. He said normally his office would ask the survey department for a final survey. He thought no requisition for final survey has been made in respect of the area shown by C-1. That he said was in accordance with his records. But then his office was in charge of this area only in 1975. How was the area surveyed if no requisition was made? D.W.2 was clear that C-1 was a final survey. In cross-examination D.W.3 admitted that section 83 could only be exercised before a final survey. So how could it be invoked if there was a final survey as clearly stated by D.W.2. Yet, D.W.2 in cross-examination recommended resurvey under section 83(3) of the National Land Code. On this the learned Judge commented:–

"The basis of his recommendation he has said, is section 83(3) but it is obvious that this is not a case of the area enclosed by the boundaries being substantially different from those provisionally approved for alienation as envisaged by that provision. This is actually a case of the defendants' lots being wrongly demarcated by virtue of the mis-siting of the public road and of being therefore wrongly emplaced in breach of the specifications contained in their respective qualified titles. Further, it is also clear from a reading of the provisions of section 83 that the procedure laid out therein can only be invoked if the survey plan has not been approved but in this case C-1 clearly shows that it has been approved."

All lands in that area were held under qualified titles. Areas were calculated and lots assigned. A final survey has been carried out as shown by C-1. From the evidence the plaintiff has in our view, as in the view of the learned Judge, established on the balance of probabilities that the lands upon which the defendants has trespassed were his. The wrong siting of the road which caused certain lots to have more land and others to have less is a matter between the authority and the respective landowners. Much stress was made of the fact that both defendants' lots have been made very much less in area as compared with their qualified titles even taking into account the encroachments. They have therefore suffered more than the plaintiff. It does not give any owner of a qualified title the right to encroach on the land of another owner of a qualified title to make up for his lost land by unlawful extension of his building thus encroaching on another's land. He does so at his peril. It is true that court has very wide jurisdiction where individual landownerships call out for remedies. Two wrongs do not make one right. On the other hand, the court must also protect other owners of land who had done no wrong and whose land for no reason was encroached upon. On this the learned Judge has this to say at page 47 of the Appeal Record:–

"I must say that I do not think it is right or equitable that the malfeasance of the authorities concerned in mis-siting the road which deprived the defendants of their rightful land areas in terms of their size and location should be visited upon the plaintiff through no fault of his. The defendants' remedy should have been sought against the authorities concerned and should not prejudice the rights of an innocent third party like the plaintiff.

I have considered the powers of the Court under Section 417 and I do not think, having regard to the purpose and scheme of the code, that I am empowered to make an order in terms of the request made on behalf of the defendants that the Court direct that a resurvey of the whole area be conducted in order to rectify the errors committed by the relevant authorities in constructing the road. Much as I sympathise with the defendants I am satisfied that the plaintiff is entitled to the reliefs he has sought against them both ....."

On the evidence we agree with what the learned Judge has said.

In his submission in the court below, Mr. Pradhan correctly pointed out that this difficulty was created by the Land Settlement Officer. The plaintiff was innocent of the activities of the said officer. All the plaintiff sought is to use his land to which he has title. If the defendants have to suffer because of the action of some third party then these remedies are against the third party. They cannot deprive the plaintiff of the use and occupation of his land. The fact that he is not living on the land is immaterial.

The term "final survey" is a mere description. The National Land Code refers to survey and not to final survey. (Section 176).

The word "survey" is defined by section 396. From the evidence it is clear that the provisions of section 396 have been complied with. D.W.2 was responsible for C-1 and has approved it. He conceded it was a final survey. Here we have a survey within the meaning of the National Land Code and the effect of the survey is that the boundaries shown by the survey are conclusive. The difficulties created by the wrong siting of the road is another matter. It has nothing to do with the rights of the plaintiff under his qualified title. Under section 176(2) qualified title should confer on the proprietor the "like rights" that is to say the protection under section 340 the centre piece of the National Land Code. Section 92 states clearly that alienation of State land is indefeasible.

On the matter of the fence it was said that there was no evidence to show that the fence was shifted since 1977 and therefore the defendants should be allowed to stay. The fence has been proved to be erected on the plaintiff's land. This is really an admission that the defendants had been occupying plaintiff's land and that they are entitled to adverse possession. An adverse possession is no defence under section 341. A true owner can never be dispossessed of his land. The plaintiff alleges encroachment but the defence is a complete denial. The only issue before the court is therefore the question whether there has been any encroachment or not. The question depends on the evidence that is before the court. In this case it is based on the relative strength of their titles: see *Ocean Estates Ltd.* v. *Norman Pinder.*[1] The parties all have qualified titles. Their titles are of equal strength. Unless the defendant can show that on the basis of his title he has built within the areas given by his title he would be guilty of trespass. Once the plaintiff has established his title and encroachment by the defendants the latter must show that they have better titles than the plaintiff in respect of the areas they were alleged to have encroached. Persons with qualified titles are entitled to protection just as any other title holders. Adverse possession by a person for however long a period does not extinguish the title of the registered proprietor nor does it in any way further his right to possession. Merely erecting permanent structure by extension of building unlawfully on the land is not sufficient to create any right against the rightful owner protected by title.

As to damage plaintiff conceded that no special damages have been pleaded. Once the plaintiff knew of the encroachment he wrote to the defendants to cease the trespass. He has asked them verbally previously to remove the encroachment but they refused to do so. They took the risk when they extended their buildings illegally by encroaching on the plaintiff's land. If they had sought approval for extension they would have to refer to the building plan in which case they would be made aware of the location of the boundaries.

The learned Judge assessed damages from February 1, 1980 up to date of judgment at 5 cents per square foot per month in respect of 1st defendant, 550 square feet and of 2nd defendant, 590 square feet with costs against the defendants to be taxed. When the amount is calculated it is not high. It is not unreasonable or unfair.

For reasons given we dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co.; Chye, Chow, Chung & Co.; Skrine & Co.*

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## ANG KOON KAU & ANOR. v. LAU PIANG NGONG

**[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) March 6 & June 23, 1984]**

**[Johore Bahru – Federal Court Civil Appeal No. 279 of 1983]**

*Tort – Negligence – Pleadings – Pleadings imprecise – Evidence in Court not supporting allegation in pleadings – Defendant not taken by surprise – Particulars of negligence proved.*

*Practice and Procedure – Pleadings – Imprecise pleadings.*

In this case the respondent was travelling on a motor cycle following a motor lorry-cum-trailer driven by the first appellant. At a bend the lorry-cum-trailer was involved in an accident with an on-coming lorry. The respondent sustained injuries from the accident and made a police report in which he said that he was behind the lorry-cum-trailer when the trailer came off and then collided with the motor lorry coming from the opposite direction. He then stopped his motorcycle and went to the side of the road but the on-coming lorry which had collided with the trailer hit him and oil-palm fruits from the lorry fell over him. In his statement of claim the respondent had alleged that the trailer of the lorry had become disconnected and then collided with his motorcycle and the other lorry. In other words he claimed that it was the trailer and not the other lorry which had collided with him. In his evidence in chief the respondent confirmed the account given in his police report. In particular he repeated that the trailer had snapped off before the collision between the tractor and the on-coming lorry. The learned judge found in favour of the respondent. The appellants appealed. The main question was whether since the statement of claim alleged that it was the trailer which collided with the plaintiff's (respondent's) motorcycle and since no evidence was given in court to support this allegation, the plaintiff/respondent could succeed in the claim.

**Held,** dismissing the appeal: the legal result which the plaintiff/respondent was seeking to show from the facts pleaded was that the first defendant/appellant had failed in his duty of care to the plaintiff/respondent, resulting in the injuries and damage suffered by him. The learned trial judge found on the evidence adduced that all the particulars of negligence alleged against the 1st appellant with regard to the trailer was on the balance of probabilities proved. Since he found that the defence had advanced no explanation whatsoever as to why or how the collision had come about, he rightly gave judgment for the plaintiff/respondent.

*Cases referred to:–*

(1) *Anjalai Ammal & Anor.* v. *Abdul Kareem* [1969] 1 M.L.J. 22.
(2) *Esso Petroleum Co Ltd* v. *Southport Corporation* [1956] 2 W.L.R. 81.
(3) *Menah binti Sulong* v. *Lim Soo & Anor.* [1983] 1 C.L.J.. 26.
(4) *Siti Aishah binti Ibrahim* v. *Goh Cheng Hwai* [1982] 2 M.L.J. 124.
(5) *K.E.P Mohamad Ali* v. *K.E.P Mohamad Ismail* [1981] 2 M.L.J. 10.
(6) *O.C.B.C. Limited* v. *Philip Wee Kee Puan* [1984] 2 M.L.J. 1.
(7) *Playing Cards (Malaysia) Sdn Bhd* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.
(8) *Waghorn* v. *George Wimpey & Co. Ltd.* [1969] 1 W.L.R. 1764.
(9) *John G. Stein & Co Ltd* v. *O'Hanlon* [1965] A.C. 890, 909.

FEDERAL COURT.

*Dulip Singh* for the appellants.
*Subra Naicker* for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman F.J.** (delivering the Judgment of the Court): The plaintiff Lau Piang Ngong was on his way to Batu Pahat travelling on a motor cycle. At the 25th milestone Johore Bahru/Ayer Hitam road he followed a motor lorry-cum-trailer No. JM 4870 driven by the defendant Ang Koon Kau. At a bend Ang's lorry-cum-trailer was involved in an accident with an on-coming motor lorry JJ 1058, the driver of which was killed in the accident. In the Statement of Agreed Facts it appeared that the road surface was dry, the weather condition was fine and visibility was good.

A few hours after the accident Ang lodged a police report in which he said that at the time of the accident his trailer detached itself from the lorry. He then stopped and saw his trailer some 400 yards behind. On looking closer he found blood on the left side of the road and also discovered that his trailer was damaged. He gave no explanation in the report as to how the trailer had become detached.

Lau sustained serious injuries from that accident and made a police report just over two months thereafter. In it he said that at the scene